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Preliminary report on the protection of persons in the event of disasters

by Mr. Eduardo Valencia-Ospina, Special Rapporteur

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I. Introduction*

A. Inclusion of the topic in the programme of work of the International Law Commission

1. At the fifty-fourth session of the International Law Commission in 2002, its Planning Group established the Working Group on the Long-term Programme of Work, chaired by Mr. Alain Pellet,[1] which was reconstituted at the Commission's fifty-eighth session in 2006.[2] During that quinquennium, the Working Group requested its members, other Commission members and the Secretariat to prepare drafts on a number of topics. A proposal concerning international protection of persons in critical situations had been submitted by Mr. Maurice Kamto in 2004 for the consideration of the Working Group.[3] The Codification Division of the Office of Legal Affairs of the United Nations Secretariat, which serves as the secretariat of the Commission, submitted proposals to the Working Group, under the title "International disaster relief law", during the fifty-eighth session of the Commission in 2006.[4] At that session, the Commission expressed its appreciation for the valuable assistance rendered by the Codification Division in the preparation of such proposals.[4] At the same session, the Planning Group recommended, and the Commission endorsed without discussion, the inclusion in its long-term programme of work of the topic "Protection of persons in the event of disasters"[5] and, as the syllabus on that topic, reproduced the Secretariat's proposal as annex C to its report.

2. At its fifty-ninth session in 2007, the Commission decided to include the topic in its current programme or work and appointed Mr. Eduardo Valencia-Ospina as Special Rapporteur.[6]

3. At its sixty-first session, the General Assembly, on the recommendation of its Sixth Committee, adopted resolution 61/34 of 4 December 2006, entitled "Report of the International Law Commission on the work of its fifty-eighth session", by which, inter alia, it took note of the decision of the Commission to include five topics in its long-term programme of work.

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[1] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* and corrigendum (A/57/10 and Corr.1), para. 521.

[2] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 256.

[3] Copies are on file with the Codification Division.

[4] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 261.

[5] Ibid., para. 257.

[6] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 375.

4. At its sixty-second session, the General Assembly, on the recommendation of the Sixth Committee, adopted resolution 62/66 of 6 December 2007, entitled "Report of the International Law Commission on the work of its fifty-ninth session", by which, inter alia, it took note of the decision of the Commission to include the topic "Protection of persons in the event of disasters" in its programme of work.

5. During the consideration by the Sixth Committee in 2007 of the Commission's report on the work of its fifty-ninth session, a number of representatives welcomed the inclusion of the topic in the Commission's programme of work,[7] while one representative continued to have doubts as to whether the topic was appropriate for the codification or progressive development of international law.[8]

6. Upon his appointment, the Special Rapporteur undertook to establish initial contacts with representatives of interested governmental and non-governmental organizations, including the Representative of the Secretary-General on the human rights of internally displaced persons, the Assistant Secretary-General for Humanitarian Affairs and Deputy Emergency Relief Coordinator, Office for the Coordination of Humanitarian Affairs, and senior officials of the International Disaster Response Laws, Rules and Principles Programme of the International Federation of Red Cross and Red Crescent Societies (IFRC).

7. For the benefit of the Special Rapporteur, a one-day round-table meeting on the topic "Protection of persons in the event of disasters" was convened at the University of Cambridge by the Lauterpacht Centre for International Law in March 2008. The meeting was presided over by the Director of the Centre, Professor James Crawford, a former member and Special Rapporteur of the Commission, and was attended by 18 participants who brought to the discussion a variety of relevant expertise.

8. At its fifty-ninth session in 2007, the Commission expressed its appreciation for the valuable assistance of the Codification Division in the preparation of research projects, by providing legal materials and their analysis.[9] At that session, the Commission requested the Secretariat to prepare a background study, initially limited to natural disasters, on the topic, "Protection of persons in the event of disasters".[10] The Special Rapporteur takes this opportunity to express, as did the Commission, his appreciation to the Legal Counsel and, in particular, the Director and members of the Codification Division for their most comprehensive study which will doubtless prove to be an indispensable point of reference in the Commission's future work on the topic. The Special Rapporteur also expresses his thanks to the Division for furnishing him with background material, including

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[7] See the statements made by Benin (A/C.6/62/SR.18, para. 47), Egypt (A/C.6/62/SR.18, para. 71), Guatemala (A/C.6/62/SR.19, para. 12), United Kingdom of Great Britain and Northern Ireland (A/C.6/62/SR.19, para. 42), Sri Lanka (A/C.6/62/SR.19, para. 55), India (A/C.6/62/SR.19, para. 107), Poland (A/C.6/62/SR.20, para. 1), United States of America (A/C.6/62/SR.20, para. 23), Hungary (A/C.6/62/SR.21, para. 7), Greece (A/C.6/62/SR.21, para. 53), Romania (A/C.6/62/SR.21, para. 78), Israel (A/C.6/62/SR.21, para. 99), Kenya (A/C.6/62/SR.21, para. 112), Sierra Leone (A/C.6/62/SR.24, para. 100) and New Zealand (A/C.6/62/SR.25, para. 19).

[8] See the statement made by Portugal (A/C.6/62/SR.19, para. 77).

[9] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 386.

[10] Ibid. The study will be issued as document A/CN.4/590 and Add.1-3.

bibliographical references. With the benefit of the Secretariat study and keeping in mind the preliminary character of the present report, the Special Rapporteur deems it more economical to refrain as much as possible from duplicating the information provided by the Secretariat in its study.

B. Purpose of the present report

9. The present report is of necessity preliminary in character. It is mainly intended to deal in a general way with the scope of the topic, in order to properly circumscribe it. It is, therefore, an exploratory rather than a definitive study. It will attempt to identify the basic assumptions that should inform the work of codification and progressive development of the topic. To that end, it will raise a number of preliminary questions, some of which were dealt with to a certain extent in the Secretariat's initial proposal for the topic. Whereas that proposal focused on the general principles applicable to the operational mechanisms, the present report places emphasis on the general scope of the subject. Its purpose is to broadly outline the questions that need to be considered at the outset by the Commission in connection with the protection of persons in the event of disasters and the legal problems that they give rise to. The report aims to stimulate discussion in the Commission in order to provide the Special Rapporteur with the requisite guidance as regards the approach to be followed.

10. In including the topic in its long-term programme of work, the Commission gave it the title of "Protection of persons in the event of disasters". However, there are no official records that would throw light on the reasons that might have led the Commission to single out "protection of persons" over "relief" or "assistance", the basic aspect emphasized by the Secretariat in its original proposal. There is, therefore, a need at the preliminary stage clearly to define the topic, elucidating its core principles and concepts.

11. An initial step in the process involves determining the scope of the topic, not only ratione materiae but also ratione personae and ratione temporis. The title agreed to by the Commission — protection of persons in the event of disasters — must have some bearing on its scope. On the face of it, it may imply that the work to be undertaken would not entail an exhaustive analysis of the legal ramifications of disasters but only those that pertain to the protection of persons.

12. The title also imports a distinct perspective, that is, of the individual who is a victim of a disaster, and therefore suggests a definite rights-based approach to treatment of the topic. The essence of a rights-based approach to protection and assistance is the identification of a specific standard of treatment to which the individual, the victim of a disaster, in casu, is entitled. To paraphrase the Secretary-General,[11] a rights-based approach deals with situations not simply in terms of human needs, but in terms of society's obligation to respond to the inalienable rights of individuals, empowers them to demand justice as a right, not as a charity, and gives communities a moral basis from which to claim international assistance when needed.

13. The present report first traces the evolution of the protection of persons in the event of disasters. Next, reference is made to the sources and international efforts to

[11] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 1* (A/53/1), para. 174.

codify and develop the law on this topic. The report then presents in broad outline the various aspects of the general scope with a view to identifying the main legal questions to be covered. Lastly, the Special Rapporteur advances a tentative conclusion without prejudice to the outcome of the discussion that the report aims to trigger in the Commission.

II. Background

A. Evolution of the protection of persons in the event of disasters

14. Disasters have always played an important part in the history of the human species. Examples include the eruption of Vesuvius in 79 AD, the plague that occurred during the Middle Ages and the tsunami which struck large parts of Asia in 2004. Considerations of humanity have informed the moral appeals to assist victims of disasters and the solidarity in response to disasters. It is worth recalling that orders of chivalry, such as the Knights of Malta, better known as the Order of Saint John, founded in 1080, provided relief to those in need, including those affected by disasters. With the rise of the modern nation State and international law, the Swiss diplomat and lawyer Emer de Vattel wrote in 1758 a passage often quoted:

> "... when the occasion arises, every Nation should give its aid to further the advancement of other Nations and save them from disaster and ruin, so far as it can do so without running too great a risk ... if a Nation is suffering from famine, all those who have provisions to spare should assist in its need, without, however, exposing themselves to scarcity ... To give assistance in such dire straits is so instinctive an act of humanity that hardly any civilized Nation is to be found which would refuse absolutely to do so ... Whatever be the calamity affecting a Nation, the same help is due to it".[12]

15. However, 100 years would pass before another Swiss citizen, Henri Dunant, would successfully rally support for international norm-setting to effectively assist victims in the event of armed conflict as a form of disaster. The creation of the International Committee of the Red Cross and the adoption of the Geneva Convention of 1864 resulted from the concerns expressed over the protection of those wounded in the field during armed conflict. The first arrangements for the protection and assistance to be given to certain groups of persons were thus made in the context of warfare.

16. Equal recognition of the needs of those affected by other disasters began to come about in the second half of the nineteenth century. In accordance with their mandate,[13] national Red Cross and Red Crescent societies provide assistance and relief in disasters which may afflict peoples during peacetime as a condition of their vigorous development and a useful preparation for their wartime work; in peacetime, they devote themselves to humanitarian work that corresponds to their wartime duties, that is, giving relief in case of public calamity which, like war,

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[12] E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, text of 1758, Books I to IV, translation by Charles G. Fenwick with an introduction by Albert de Lapradelle (Carnegie Institution of Washington, 1916), vol. III, p. 114.

[13] See resolution 3 of the Second International Red Cross Conference, Berlin, 1869.

demands immediate and organized assistance. Nevertheless, the provision of international assistance to victims of disasters other than armed conflict has only positioned itself as a major issue on the agenda of the international community since the beginning of the twentieth century. The importance attached to disaster relief has gained further recognition over the course of the past century as the frequency, intensity and complexity of disasters increased. With the formation of the International Red Cross and Red Crescent Movement and the establishment of the International Relief Union (IRU),[14] international disaster relief began to make its way into the realm of international law. Since then, the legal aspects of the subject have increasingly attracted attention at the international level. Whereas mutual self-interest has driven States to conclude instruments concerning their conduct in war, international cooperation in the area of protection and assistance in the event of disasters has taken on a wider dimension. Enhanced international solidarity in the event of disasters has reinforced the need for greater regulation of international law.

17. Protection and assistance activities undertaken in the event of disasters have generally been approached pragmatically. This is reflected in the steady growth of regulatory frameworks, mostly on a bilateral basis but also through the organs of the United Nations and its specialized agencies and entities such as the International Red Cross. International law-making and organizational developments in disaster governance reveal both the recurring need to deal with the protection of persons and the approach of the international community in that regard. These two themes — international legislation and organization — go hand in hand for purposes of providing adequate and effective assistance to those affected by a humanitarian emergency, such as a disaster.[15]

18. In 2001, IFRC undertook to evaluate the dispersed body of existing international and national norms relating to disaster relief by implementing its International Disaster Response Laws (IDRL) project. On the basis of the project's results, the International Red Cross and Red Crescent Movement, consisting of the Red Cross and Red Crescent organs and the States Parties to the Geneva Conventions, recently (in November 2007) adopted a set of operational guidelines on assistance in the event of disasters. According to IFRC, the legal core of international disaster relief law consists of the laws, rules and principles applicable to the access, facilitation, coordination, quality and accountability of international disaster response activities in times of non-conflict related to disasters, which includes preparedness for imminent disaster and the conduct of rescue and humanitarian assistance activities,[16] and is grounded on the premise that such activities apply in the event of a disaster, regardless of its origin, except in situations of armed conflict which are covered by international humanitarian law. Moreover, the primary focus of IDRL is on the operational side of protection, namely, assistance.

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[14] The Convention and Statute Establishing an International Relief Union was opened for signature in 1927 and entered into force in 1932; the Union is, however, no longer in operation.

[15] F. Kalshoven, "Assistance to the victims of armed conflicts and other disasters", in F. Kalshoven (ed.), *Assisting the Victims of Armed Conflicts and Other Disasters*, Papers delivered at the International Conference on Humanitarian Assistance in Armed Conflict, The Hague, 22-24 June 1988 (Dordrecht, Netherlands, Martinus Nijhoff Publishers, 1989), p. 14.

[16] International Federation of Red Cross and Red Crescent Societies, "International disaster response laws (IDRL): project report 2002-2003" (03/IC/11), p. 15 (available at www.icrc.org/Web/eng/siteeng0.nsf/html/5XRDP7).

19. An IFRC desk study,[17] and the Secretariat's study both identify a distinct corpus of law relating to international disaster response and relief, and provide detailed inventories of its various sources. There exists a significant number of bilateral treaties dealing with matters of mutual assistance. In addition, IDRL is informed by a considerable amount of soft law instruments applicable to humanitarian assistance activities in the event of disasters, notably decisions of organs of the United Nations and other international organizations. Not surprisingly, the precepts making up IDRL vary significantly from one another in their material, spatial and temporal dimensions. Therefore, assessing the weight of IDRL and the level of support it garners within the international community is by no means straightforward.

20. On a wider conceptual level, IDRL shares with international humanitarian law a significant number of fundamental principles which will usefully guide its future development.[18] Furthermore, IDRL draws on international human rights law and international law on refugees and internally displaced persons. To that extent, the sources that inform IDRL are largely the same as those that underlie the present, distinct topic, as outlined in section B below. At the same time, IDRL raises questions vis-à-vis the topic under consideration by the Commission, including how to classify, as opposed to merely identify, existing law and practice.

B. Sources

21. Three immediate sources of present-day international disaster protection and assistance can be singled out: international humanitarian law, international human rights law and international law on refugees and internally displaced persons. For the purposes of the present report, it suffices to give a brief characterization of each of these three sources from the perspective of the topic under consideration.

1. International humanitarian law and humanitarian assistance

22. As pointed out, the first agreements concluded by States recognizing humanitarian concerns and humanitarian action were limited to a particularly grave emergency situation: armed conflict. Historically, the dynamics of armed conflict have stood out from those of peacetime situations. Based on the principles of humanity, neutrality and impartiality, specific standards of conduct were developed, including those for international assistance. These initial agreements focused, in particular, on protection and assistance given to the military rather than the civilian population. However, owing to the increase in the number of civilian victims suffering the effects of war, the protection of all those hors de combat became a major focus of subsequent agreements concerning the behaviour of parties engaged in armed conflict.

23. The agreements dealing with conduct during armed conflict gradually formed the body of law known today as international humanitarian law,[19] a field of law that

[17] D. Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

[18] M. H. Hoffman, "What is the scope of international disaster response law?", in *International Disaster Response Laws, Principles and Practice: Reflections, Prospects and Challenges*, (International Federation of Red Cross and Red Crescent Societies, Geneva, 2003), pp. 13-20.

[19] See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at paras. 74-87.

has been codified in a fairly comprehensive manner. The application of international humanitarian law is conditioned upon the existence of an armed conflict and upon persons belonging to specific categories. At any rate, the multifaceted layers of protection offered by international humanitarian law envisage the individual as the ultimate beneficiary.[20]

24. The basic rules of providing relief to the civilian population in armed conflict, that is, humanitarian assistance, are embodied in the Geneva Conventions of 1949[21] and the Additional Protocols thereto, of 1977.[22] The rules found in these instruments reflect to a large extent the corresponding customary rules.[23] In addition, rules can be found in agreements between the parties to a conflict or between one or more parties to a conflict and the International Committee of the Red Cross (ICRC). Moreover, whether intergovernmental or not, international organizations such as IFRC, the main organs of the United Nations and the specialized agencies, and departments of the United Nations Secretariat such as the United Nations Office for the Coordination of Humanitarian Affairs, play a major role through their internal rules and decisions on matters of relief in conflict situations, including peacekeeping missions.[24] Consequently, in conflict situations there exists a large body of law dealing with assistance that may not only inspire rules on the protection of persons in the event of disasters but may even be applied by analogy, to the extent that a rule is relevant to disaster situations other than armed conflict.

2. International human rights law as the paradigm for a rights-based approach to protection

25. International human rights law comprises rights and freedoms enjoyed by the individual by virtue of international law. International human rights law bestows upon the individual the status of rights holder. States are under permanent and universal obligation to provide protection to those on their territory under the various international human rights instruments and customary international human rights law.

26. In the context of disasters, a number of human rights are of particular importance. Examples of the rights that are pertinent in the event of a disaster include the right to life,[25] the right to food,[26] the right to health and medical services,[27] the right to the supply of water,[28] the right to adequate housing, clothing

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[20] R. Provost, International Human Rights and Humanitarian Law (Cambridge, Cambridge University Press, 2002), p. 34.

[21] United Nations, *Treaty Series*, vol. 75, Nos. 970-973.

[22] Ibid., vol. 1125, Nos. 17512 and 17513.

[23] See J-M. Henkaerts and L. Doswald-Beck, *Customary Rules of International Humanitarian Law*, ICRC study in two volumes (Cambridge, Cambridge University Press, 2005).

[24] B. Jakovljević, "International disaster relief law", in *Israel Yearbook on Human Rights*, vol. 34 (2004), p. 256.

[25] International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, No. 14668, art. 6.

[26] International Covenant on Social, Economic and Cultural Rights, United Nations, *Treaty Series*, vol. 993, No. 14531, art. 11.

[27] Ibid., art. 12.

[28] Convention on the Elimination of All Forms of Discrimination against Women, United Nations, *Treaty Series*, vol. 1249, No. 20378, art. 14, para. 2 (h).

and sanitation,[29] and the right not to be discriminated against.[30] The link between international human rights law and disasters has not yet been generally reflected in existing hard law instruments on either subject. To date, only two international human rights instruments are expressly applicable in the event of disasters. The Convention on the Rights of Persons with Disabilities[31] does not refer to a right to protection, the provision being formulated rather as an obligation on the contracting State to ensure protection and safety in the occurrence of a natural disaster.[32] Equally, the African Charter on the Rights and Welfare of the Child explicitly sets forth the obligation to ensure that a child receives appropriate protection and humanitarian assistance.[33] The relevant provisions of both of the aforementioned instruments refer to international human rights law and international humanitarian law as the context in which those obligations should be fulfilled. The nature of these provisions would, thus, seem to set public order standards for States, informed by the principle of humanity rather than that of individual rights. In this connection, it is important to recall that each human right is deemed to entail three levels of obligation on the State: the duty to respect, protect and fulfil.[34] A rights-based approach to protection and assistance in the event of disasters contemplates those obligations as well.

3. International law on refugees and internally displaced persons and disasters

27. Disasters often generate the mass displacement of persons, either across borders (refugees) or within those of a disaster-affected State (internally displaced persons). Refugees and internally displaced persons are generally treated as distinct categories entitled to particular rights by virtue of a situation-specific protection regime.

28. International refugee law has been developed against the background of displacement caused by persecution and destruction during armed conflict, in particular the Second World War, which led to the adoption in 1951 of the

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[29] International Covenant on Social, Economic and Cultural Rights ..., art. 11.

[30] International Covenant on Civil and Political Rights ..., art. 2.

[31] General Assembly resolution 61/106 of 13 December 2006, annex I.

[32] Ibid., art. 11

[33] African Charter on the Rights and Welfare of the Child, Organization of African Unity document CAB/LEG/24.9/49 (1990), art. 23, paras. 1 and 4.

[34] See, for example, the comments made by the Human Rights Committee in 1982 concerning article 6 (Right to life) of the International Covenant on Civil and Political Rights, in which the Committee considered that States should take positive measures to "eliminate malnutrition and epidemics" (HR/GEN/1/Rev.7, sect. II, general comment No. 6, para. 5). These levels of obligation have been more explicitly addressed in the context of the International Covenant on Economic, Social and Cultural Rights. The Committee on Economic, Social and Cultural Rights, in considering in 1999 article 11 of the Covenant (Right to adequate food), commented that (a) "States had a core obligation to take the necessary action to mitigate and alleviate hunger, even in times of natural or other disasters," (b) "the State had to demonstrate that every effort had been made to use all the resources at its disposal", and (c) that if it was unable to carry out its obligation, it had the burden of proving that this was the case and that it had "unsuccessfully sought to obtain international support" (ibid., sect. I, general comment No. 13, paras. 6 and 17).

Convention relating to the Status of Refugees,[35] the cornerstone document of international refugee law. International refugee law obliges a State to provide protection to persons entitled to the status of refugee in cases in which such persons are not adequately protected in their State of origin because of its unwillingness or inability to do so. The occurrence of a disaster is not envisaged as grounds for granting refugee status. However, it is often in an emergency situation, such as a disaster, where persecution — a legal ground for the granting of refugee status — is likely to take place. In addition, a party to the 1951 Refugee Convention, under article 23, has the obligation to accord refugees lawfully staying in its territory the same treatment in respect of public relief and assistance as accorded its own nationals.

29. At present, there is no legally binding instrument governing internally displaced persons. An authoritive (non-binding) source of norms guiding the protection of internally displaced persons is the Guiding Principles on Internal Displacement, elaborated by the Representative of the Secretary-General on Internally Displaced Persons (E/CN.4/1998/53/Add.2, annex).[36] The Guiding Principles provide for the protection, inter alia, of those displaced by a natural or man-made disaster.[37] In particular, the Guiding Principles expressly state that the primary responsibility for protection and assistance lies with the national authorities and that internally displaced persons have the right to request and to receive protection and assistance from them.[38]

4. Legal instruments specifically applicable to assistance in the event of disasters

30. The three sets of rules described above determine in a general way the legal context in which the protection of persons takes place. However, a vast number of more directly applicable instruments is available, specifically tailored to the operational component of protection (i.e., assistance) in the event of disasters. The Special Rapporteur does not find it useful to repeat here the exhaustive list of instruments identified in the Secretariat study.[39] For the purposes of the present report, it suffices to highlight certain significant legal frameworks and norm-setting trends in the event of disasters.

Multilateral treaties

31. While no universal comprehensive instrument dealing with the general aspects of protection of persons in the event of disasters exists at the multilateral level, a

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[35] United Nations, *Treaty Series*, vol. 189. No. 2545. The convention and the 1967 Protocol thereto (ibid., vol. 606, No. 8791) entered into force 4 October 1967. See also the Organization of African Unity Convention governing the specific aspects of refugee problems in Africa of 1969 (ibid., vol. 1001, No. 14691) and the Cartagena Declaration on Refugees, adopted on 22 November 1984 by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (International Journal Refugee Law, vol. 3, No. 2, April 1991).

[36] See also Protocol on the Protection and Assistance of Internally Displaced Persons adopted on 30 November 2006 by the International Conference on the Great Lakes Region, in which Member States undertake to adhere to the Guiding Principles on Internal Displacement. Available at http://www3.brookings.edu/fp/projects/idp/GreatLakes_IDPprotocol_final.pdf.

[37] Guiding Principles (E/CN.4/1998.53/Add.2, annex): "Introduction: scope and purpose", para. 2.

[38] Ibid., guiding principles 3 and 25.

[39] A/CN.4/590/Add.2 (to be issued). For a detailed survey of applicable rules and instruments, see also Fisher, op. cit., part II, at pp. 33-87.

number of instruments, both universal and regional, deal with specific aspects of protection. Moreover, a considerable number of soft law and non-legal pronouncements has been prepared and adopted, including under the aegis of or in collaboration with the United Nations. Furthermore, the non-governmental community has contributed through the adoption of guidelines or model rules.

32. The first multilateral treaty exclusively concerned with the general aspects of disaster relief was the Convention and Statute of the International Relief Union (1927). However, it only contributed to relief on two occasions.[40] Though technically still in force among 17 States, the assets and responsibilities of the Union were transferred to the United Nations by the Economic and Social Council in its resolution 1268 (XLIII) of 4 August 1967. One of the main reasons for the Union becoming inactive was the structure of the Convention. The treaty system was considered weak as it relied on specific rights and duties without taking into account their legal underpinnings and thereby identifying the applicable general rights and duties.[41] It is worth noting that the scope of the Convention covered both armed conflict and peacetime situations.[42]

33. There are at present only two universal treaties in force which contain general rules for the provision of international assistance: (a) the Framework Convention on Civil Defence Assistance, adopted in 2000, which deals with cooperation among national civil defence entities; and (b) the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, adopted in 1998 and which entered into force in 2005. The latter Convention offers a comprehensive legal framework for the provision of telecommunications assistance during disaster relief operations, including the coordination of such assistance and the reduction of regulatory barriers. It deals with an important number of general issues, albeit limited to telecommunications, which could influence more general future codification. It should be noted that the Convention does not contain a statutory limitation to its applicability in armed conflict. Besides, it incorporates non-governmental organizations as assisting actors granted a number of specific facilities. Neither instrument has attracted wide participation and both have suffered from ineffective application in the field.

34. A number of relevant agreements have been adopted at the regional and subregional levels, for example, in Europe, Latin America and Asia. The regional treaties are of particular relevance to the study of this topic in that they tend to be more general in nature, covering a wide range of issues. The most recent such agreement is the Agreement on Disaster Management and Emergency Response, adopted by the Association of Southeast Asian Nations (ASEAN)[43] on 26 July 2005 following the tsunami of December 2004, which reflects much of contemporary thinking in terms of disaster mitigation and risk reduction and addresses international cooperation in disaster response. Some of the agreements establish regional entities entrusted with mandates to undertake a variety of tasks.

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[40] P. Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Dordrecht, Netherlands, Martinus Nijhoff Publishers, 1985), p. 370.

[41] Ibid., p. 372.

[42] Ibid., p. 367.

[43] Available at http://aseansec.org/17579.htm.

Bilateral treaties

35. The multilateral agreements are, in turn, buttressed by a significant number of bilateral agreements regulating the provision of assistance and cooperation among States, primarily, although not exclusively, in Europe (see E/CN.4/590/Add.2).[44]

Domestic legislation

36. Almost every country in the world has legislation dealing with national calamities or aspects thereof. While some States have put into place legislation that deals specifically with disaster-related matters, such as risk reduction, provision of assistance and civil defence, it is worth bearing in mind that, as pointed out in the study by the Secretariat (A/CN.4/590),[44] States regulate different aspects of disaster prevention and response through a variety of domestic laws, such as those on the protection of the environment and conservation, forestry, health, food safety, sanitation, epidemics, security, safety, protection, civil defence, immigration, customs duties and tariffs, search and rescue, emergencies, water, fire safety, prevention of industrial accidents, taxation, meteorology, spatial planning, and earthquake prevention. According to the same study, on a number of issues the national rule is determinative either by way of providing the content for an international norm or by serving to trigger the operation of international cooperation.

Other key instruments

37. The existing body of international treaties and agreements on disaster relief (encompassing both prevention and assistance) is in turn supplemented by a number of non-binding instruments, adopted primarily at the intergovernmental level but also by private institutions and entities. For example, a survey jointly carried out by the former Office of the United Nations Disaster Relief Co-ordinator and the League of Red Cross Societies resulted in a series of recommendations designed to expedite international relief by facilitating the functioning of relief personnel and the delivery of relief consignments. These measures to expedite international relief[45] were endorsed by the General Assembly in resolution 32/56 of 8 December 1977.

38. The General Assembly, by resolution 46/182 of 19 December 1991, established the basic framework within which contemporary disaster relief activities are undertaken. In that resolution, the Assembly recognized as key areas of activity disaster prevention and mitigation, preparedness, improved stand-by capacity and coordination, cooperation and leadership in the provision of disaster assistance, and laid down a number of guiding principles. It also established the linkage among relief, rehabilitation and development.

39. Special mention might also be made of the Principles and Rules for Red Cross and Red Crescent Disaster Relief,[46] the 1969 Red Cross Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster

[44] Document to be issued.

[45] See the report of the Secretary-General on the Office of the United Nations Disaster Relief Co-ordinator (document A/32/64 and Corr.1), annex II, paras. 1-3.

[46] Adopted by the Twenty-first International Conference of the Red Cross (Istanbul, 1969) and revised by the Twenty-second to Twenty-sixth Conferences (Tehran (1973), Bucharest (1977), Manila (1981), Geneva (1986) and Geneva (1995), respectively), reprinted in *International Review of the Red Cross*, No. 310 (February 1996), annex IV.

Situations,[47] the Council of Europe resolution on precautions against natural and other disasters and the planning and provision of disaster relief, adopted in 1972,[48] and the Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief adopted in 1995.[49] Other significant texts include the draft model agreement on international medical and humanitarian law adopted by the International Law Association in 1980,[50] the Model Rules for Disaster Relief Operations proposed by the United Nations Institute for Training and Research in 1982,[51] which were aimed at closing the lacunae in international humanitarian law regarding assistance to victims of disasters, the Guiding Principles on the Right to Humanitarian Assistance, adopted by the International Institute of Humanitarian Law in 1992,[52] the Mohonk Criteria for Humanitarian Assistance in Complex Emergencies, adopted in 1995,[53] the Guiding Principles on Internal Displacement, adopted in 1999 (E/CN.4/1998/53/Add.2, annex), the Sphere Project,[54] the Guidelines on The Use of Foreign Military and Civil Defence Assets in Disaster Relief (also known as the Oslo Guidelines) of 2006,[55] and the Operational Guidelines on Human Rights and Natural Disasters adopted by the Inter-Agency Standing Committee in 2006 (A/HRC/4/38/Add.1, annex).

40. Furthermore, in the 1980s a draft convention on expediting the delivery of emergency assistance was drawn up and submitted to the Economic and Social Council for consideration (see A/39/267/Add.2-E/1984/96/Add.2). Although the draft convention was never adopted, its provisions provide a useful reference point for the kinds of provisions that might eventually be included in a legal instrument were one to be adopted.

5. Recent developments

41. The increasing involvement in recent times of the international community in disaster situations has led to recognition of the need to improve regulatory law in the event of disasters to overcome the obstacles to the provision of effective assistance. Current developments attest to the importance attached to this need. They include the substantial number of resolutions related to the topic, which have been adopted by the General Assembly at its recent sessions in connection with

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[47] Resolution XXVI of the Twenty-first International Conference of the Red Cross, held in Istanbul from 6 to 13 September 1969 (text in *International Review of the Red Cross*, No. 104, November 1969).

[48] Council of Europe, Committee of Ministers Resolution (72) 6 of 18 February 1972.

[49] Adopted by the Twenty-sixth International Conference of the Red Cross and Red Crescent held in Geneva, from 3 to 7 December 1995. Text available at http://www.ifrc.org/publicat/conduct/code.asp.

[50] Reproduced in *Report of the 59th Conference of the International Law Association*, Belgrade, 17-23 August 1980, pp. 520-527.

[51] United Nations Institute for Training and Research, *Policy and Efficacy Studies No. 8* (New York, 1982).

[52] Adopted at the seventeenth Round-table Meeting on Current Problems of Humanitarian Law of the International Institute of Humanitarian Law, held in San Remo, Italy, from 2 to 4 September 1992.

[53] Reprinted in *Human Rights Quarterly*, vol. 17 (1995), pp. 192-208.

[54] *The Sphere Project: Humanitarian Charter and Minimum Standards in Disaster Response*, handbook (Geneva, 2000), revised in 2004.

[55] Available at http://ochaonline.un.org/Publications/tabid/1403/Default.aspx.

many separate but related items of its agenda,[56] the resolution on humanitarian assistance, adopted by the Institute of International Law, at its session held in Bruges, Belgium, in 2003, the Hyogo Declaration, adopted by the World Conference on Disaster Reduction in 2005,[57] and the resolution endorsing the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, adopted by the Thirtieth International Conference of the Red Cross and Red Crescent in 2007.[58]

6. Customary international law

42. While this topic seems in principle to be the subject of progressive development, the possibility of identifying applicable customary norms should not be excluded. The IFRC desk study concerning the framing of IDRL recognizes that research does not suggest the existence of a system of customary IDRL.[59] It points out, however, that IFRC research might yet produce evidence warranting reconsideration of that point.[60]

III. Scope of the topic

43. At the preliminary stage of work on the topic, the Special Rapporteur requires the Commission's guidance concerning the scope of the topic before he can be in a position to propose the corresponding draft article (or articles). To facilitate the discussion, three aspects of scope are treated below: ratione materiae, ratione personae and ratione temporis. The question of whether the scope should also be defined ratione loci is left open.

A. Ratione materiae: the concept and classification of disasters

44. The concept and classification of disasters have a significant bearing on the scope of the topic. Although disasters manifest themselves in different forms, they share common elements, the identification of which should assist in achieving a proper understanding of the concept itself.

45. A disaster situation arises from the vulnerability of human beings when exposed to a hazard. The Hyogo Framework for Action 2005-2015 defines a hazard as:

> "A potentially damaging physical event, phenomenon or human activity that may cause the loss of life or injury, property damage, social and economic disruption or environmental degradation. Hazards can include latent conditions that may represent future threats and can have different origins: natural

[56] For a list of relevant General Assembly resolutions, see document A/CN.4/590/Add.2 (to be issued).

[57] See report of the World Conference on Disaster Reduction, held in Kobe, Japan, from 18 to 22 January 2005 (A/CONF.206/6 and Corr.1), resolution 7. See also the Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters (ibid., resolution 2).

[58] Resolution 4, annex (currently available at http://icrc.org/web/eng/siteengO.nsf/htmlall/p1108/$File/ICRC_002_1108.pdf!Open).

[59] Hoffman, op. cit., p. 16.

[60] Ibid., footnote 25.

(geological, hydrometeorological and biological) or induced by human processes (environmental degradation and technological hazards)".[61]

46. The term "disaster", however, is not a legal term. There is no generally accepted legal definition of the term in international law. While some international instruments prefer to completely omit a definition of disaster,[62] others provide an all-encompassing definition. An example of the latter includes the Tampere Convention of 1998, which defines a disaster as a serious disruption of the functioning of society that poses a significant, widespread threat to human life, health, property or the environment, whether caused by accident, nature or human activity, and whether developing suddenly or as the result of complex, long-term processes.[63]

47. One first aspect that can be singled out is that the concept of disaster does not differentiate between its occurrence in a single State or among multiple States. In other words, an international component (i.e., transboundary effects) is not a prerequisite. Second, it should be noted that the threshold is often expressed in terms of the degree of dysfunction of a State, region or society. The third element relates to the inherent suffering or damage that may result from the threat to human life, health, property or the environment. The international significance of the event may then be found in the unwillingness or inability of the affected State, region or society to cope with the disaster by using only its own resources. The above-mentioned elements, in which human suffering is a critical factor, typically generate attention and response at the international level. The role of assisting actors may then be qualified as that of agents of humanity,[64] an assertion that carries its own implications for the scope insofar as it relates to protection, as discussed in the section below.

48. It is common for international instruments to differentiate among disasters according to some pre-established criteria. To begin with, disasters can be divided into two categories, according to cause: natural disasters (e.g., earthquakes, tsunamis and volcanic eruptions) and man-made disasters (e.g., oil spills, nuclear accidents and armed conflict). Furthermore, disasters are often classified in terms of their duration as sudden-onset disasters (e.g., hurricanes) and slow-onset, or creeping, disasters (e.g., droughts, food shortages and crop failures). Lastly, a classification may be made according to the context in which the disaster occurs, that is, in a single or complex emergency. A complex emergency is generally defined as a humanitarian crisis in a country, region or society in which there is total or

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[61] Report of the World Conference on Disaster Reduction ... (A/CONF.206/6 and Corr.1), resolution 2, footnote 2.

[62] For example, the Inter-American Convention to Facilitate Disaster Assistance of the Organization of American States, which was opened for signature on 7 June 1991 and entered into force on 16 October 1996.

[63] See article 1, para. 6 of the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, adopted at Tampere, Finland, on 18 June 1998. See also article 1, para. 3, of the ASEAN Agreement on Disaster Management and Emergency Response (not yet into force), which states that "disaster" means a serious disruption of the functioning of a community or a society causing widespread human, material, economic or environmental losses.

[64] D. Caron, "Addressing catastrophes: conflicting images of solidarity and separateness", in D. Caron and C. Leben (eds.), *The International Aspects of Natural and Industrial Catastrophes* (The Hague, Martinus Nijhoff, 2001), p. 1, at p. 13.

considerable breakdown of authority resulting from internal or external conflict and which requires an international response that goes beyond the mandate or capacity of any single agency and/or the ongoing United Nations country programme.[65]

49. The Secretariat proposal for the topic suggested that it be limited initially to natural disasters, based on a perceived more immediate need.[66] For his part, the Special Rapporteur is of the view that the title eventually agreed upon by the Commission suggests a broader scope. Such an approach would seem best for achieving the underlying objective codification and progressive development of the topic, namely, fashioning rules for the protection of persons. The need for protection can be said to be equally strong in all disaster situations. The conceptual scope should envisage taking account of all of the aforementioned categories, thus acknowledging the complexities involved in the categorization of disasters according to their cause, duration and context. The categories may overlap. It is not always possible to maintain a clear delineation between causes, as may be the case with desertification and global warming. An apparent natural disaster can be caused or aggravated by human activity, for example, desertification caused by excessive land use and deforestation. Another example would be the occurrence of epidemics, which may not be the direct result of a human agency but may certainly be aggravated by it due to neglect of hygiene, in particular in camps of refugees or internally displaced persons. The foregoing demonstrates the high degree of arbitrariness in disaster categorization, militating in favour of a more holistic approach. However, armed conflict per se will be excluded because there is an applicable, highly developed particular field of law dealing in great detail with such situations of social reality: namely, international humanitarian law. This would accord with the approach taken in the advisory opinion on the legality of the threat or use of nuclear weapons, in which the International Court of Justice viewed the law applicable in armed conflict which is designed to regulate the conduct of hostilities as the applicable lex specialis.[67]

B. Ratione materiae: the concept of protection of persons

50. As the title given to the topic must have a bearing on its scope, the concept of protection of persons calls for further examination. Persons affected by disasters do not constitute a separate legal category. However, because disaster victims face a very distinct factual situation, they do have specific needs that require addressing.

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[65] Working paper on the definition of complex emergency, submitted to the Inter-Agency Standing Committee at its tenth meeting on 9 December 1994 (on file with the Codification Division). The concept of complex emergencies should be distinguished from what has been termed "complex disaster", that is where one disaster agent exposes vulnerabilities which open the way for the impact of other disaster agents. See R.C. Kent, *Anatomy of Disaster Relief: The International Network in Action* (London, Pinter Publishing, 1978), p. 6.

[66] *Official Records of the General Assembly, Sixty-first session, Supplement No. 10* (A/61/10), annex C, para. 2. See, however, the Secretariat's subsequent study where it took a more inclusive approach, noting that while the bulk of the study pertained to disasters emanating from natural phenomena, few of the legal instruments and texts cited maintained a clear distinction between natural and man-made disasters (A/CN.4/590, para. 8; to be issued).

[67] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at para. 25. Compare this with the position taken in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports, 2004*, p. 136, at para. 106.

The fundamental tenet of international humanitarian law and international human rights law applicable in the event of disasters is the principle of humanity which underpins all humanitarian action.[68]

51. In the first place, the concept of protection raises a general question when contrasted with the concepts of response, relief and assistance: should the concept of protection be seen as distinct, or as encompassing those other concepts? In any disaster situation, three phases can be distinguished: pre-disaster, the disaster proper and post-disaster. The concept of response restricts itself temporally to the disaster phase. Relief is a broader concept which, like assistance, encompasses the pre-disaster stage as well as the stage beyond immediate response. In the present context, assistance can be described as the availability and distribution of the goods, materials and services essential to the survival of the population. The elements of the concept of protection depend largely on the context or area of law in which the concept is employed. Protection can be said to be all-encompassing, covering the more specific concepts of response, relief or assistance with which it is often associated. One should, however, differentiate between protection sensu lato and protection sensu stricto. This may be conceptualized as follows: there is a general, all-encompassing concept of protection which includes protection in a strict sense, denoting a rights-based approach, and other concepts, in particular assistance.

52. For the purposes of the present topic, protection has been qualified as the protection of persons. The concept protection of persons is not new in international law; it reflects a particular relationship between the qualification of persons as being those affected by disasters, and the rights and obligations attached thereto. As stated above, the regimes of protection of persons are international humanitarian law, international human rights law and international law relating to refugees and internally displaced persons. These regimes may apply simultaneously to the same situation because they essentially complement each other.[69] In addition, they are guided by a basic identity of purpose: the protection of the human person in all and any circumstances.[69] The three areas of law underscore the essential universality of humanitarian principles. The protection of persons in the event of disasters is also predicated on such principles as humanity, impartiality, neutrality and non-discrimination, as well as sovereignty and non-intervention.

53. While the title of the topic explicitly refers to the protection of persons, a protection regime often extends to protection of property and the environment. In this respect, the Special Rapporteur requires the guidance of the Commission as to whether these elements should also be treated, and with what degree of specificity.

54. It is important to define the rights and obligations that enter into play in disaster situations and the consequences that may flow from such rights and obligations. From the standpoint of the victims of disasters, this is a question not only of international humanitarian law but also of international human rights law, including the existence or not of a right to humanitarian assistance. The question of

[68] As far back as 1949, the International Court of Justice stated that the 1907 Hague Convention, one of the pillars of the modern international humanitarian law, contained certain general and well recognized principles, namely, elementary considerations of humanity, even more exacting in peace than in war. See Corfu Channel case (United Kingdom v. Albania), *I.C.J. Report 1949*, p. 4, at p. 22.

[69] A. A. Cançado Trindade, "International law for humankind: towards a new jus gentium", part II, *Recueil des Cours de l'Academie de Droit International*, vol. 317 (2005), pp. 9-312, at p. 150.

the latter right is pertinent as it is presently uncertain whether existing international law takes into account all of the legitimate needs of persons affected by disaster or whether there are gaps in the law in this respect. In international humanitarian law that right has been recognized as a matter of law. In disaster situations, however, it appears that no legal instruments explicitly acknowledge the existence of such a right. At most, it could be said to be implicit in international human rights law. The nature of such a right is, however, unclear. Would it be a human right or just a right of those affected by a disaster? Would it be an individual right or a collective right? Against whom, if at all, would it be enforceable? After all, the criteria to determine the existence and status of a human right are subject to controversy. This raises the more fundamental question of whether international human rights law has developed in that direction. However, it could be argued that formulating and elaborating such a right to assistance in the event of disasters, as a matter of progressive development of the law, would prevent the risk of fragmentation of existing human rights because of the otherwise necessary but arbitrary selection of or emphasis accorded these rights.[70] At any rate, such an approach could be taken as constituting a challenge to the principle of the sovereignty of the State and its corollary of non-intervention,[71] according to which the State has primary responsibility to offer protection and assistance to those affected by disasters on its territory.[72] Tension is created between, on the one hand, the principles of the sovereignty of States and of non-intervention and, on the other, international human rights law.[73]

55. Another source of tension is often between the rights and obligations of the assisting actor and those of the State affected by a disaster. In view of the social, economic and political implications of disaster relief and governance, States might be inclined to redefine their sovereignty by means of a constructive use of international law. The traditional State system is currently witnessing the emergence of various concepts related to the responsibility of States. As the Secretariat noted in its proposal for the topic,[74] the protection of persons may be located within contemporary reflection on an emerging principle entailing the responsibility to protect. The latter concept entails the responsibility to prevent, react and rebuild, corresponding, respectively, to the three phases of a disaster situation. However, the

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[70] J. Patrnogic, "Some reflections on humanitarian principles applicable in relief actions", in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Geneva and The Hague, Martinus Nijhoff Publishers), p. 934.

[71] On sovereignty as a cardinal principle of international law, see Corfu Channel case (United Kingdom v. Albania), *I.C.J. Report 1949*, p. 4, at p. 35. On non-intervention, see Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), *I.C.J. Report 1986*, p. 14, paras. 202-205 (the "principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law") and General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

[72] See, for example, General Assembly resolution 46/182, annex, para. 3.

[73] This point has been acknowledged in the Mohonk Criteria, which states that the principles of non-intervention and sovereignty should not be used as an obstacle to humanitarian assistance, and that the objective of humanitarian assistance is to save lives and is not intended to challenge the State on whose territory is delivered." See J. Ebersole, "The Mohonk Criteria for Humanitarian Assistance", *Human Rights Quarterly*, vol. 17 (1995), p. 159.

[74] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), annex C, para. 9.

appropriateness of extending the concept of responsibility to protect and its relevance to the present topic both require careful consideration. Even if the responsibility to protect were to be recognized in the context of protection and assistance of persons in the event of disasters, its implications would be unclear. For example, to what extent would the responsibility create rights for third parties? What would the contents of those rights be? What would trigger those rights? Would those rights be singular or collective?

C. Ratione personae

56. The multiplicity of actors involved in disaster situations is a highly pertinent factor. Work on the topic will clearly need to take account of the role of international organizations, non-governmental organizations and commercial entities in addition to that of State actors. It will require assessing the practice of non-State actors and the weight to be accorded to it in order to place them properly within the framework of protection of persons in the event of disasters. There are pertinent questions to be posed. For example, is there a right of initiative, as is recognized as a matter of law in international humanitarian law instruments? Is a formal offer from or request to an assisting non-State actor necessary? What are the obligations of non-State actors to protect, if at all, as distinct from providing assistance? Does the individual have a right in relation to non-State actors? What is the position of commercial subcontractors? As these questions suggest, the legal consequences may differ, depending on the actor involved.

D. Ratione temporis

57. A broad approach appears indicated as concerns the phases which should be included, in order to provide fully fledged legal space. The importance of a coherent framework in terms of rights and obligations becomes apparent when considering the wide range of specific issues to which providing disaster assistance gives rise through successive phases, not only of disaster response but also pre-disaster and post-disaster: prevention and mitigation on the one hand, and rehabilitation on the other. A good example is the potentially controversial question of prevention. It is interesting to note that the concept of responsibility to prevent is also a recognized component in the emerging concept of protection in international humanitarian law. However, the nature and extent of the purported obligation of States to prevent disasters (acting individually or collectively) raises profound questions, which may need to be addressed.[75] In this connection, work carried out by the Commission on the topic of prevention of transboundary damage from hazardous activities would be of relevance.

58. At the other end of the spectrum is the rehabilitation phase. Rehabilitation activities are properly linked to the response phase which addresses the immediate needs of individuals affected by a disaster. This should be distinguished from development activities, which can be described in terms of support to and implementation of autonomous development policies. These phases may not always

[75] See C. Romano, "L'obligation de prevention des catastrophes industrielles et naturelles", in Caron and Leben (eds.), op. cit., pp. 379-428, and A. Berramdane, "L'obligation de prevention des catastrophes et riques naturelles", in *Revue de Droit Public*, vol. 113 (1997), pp. 1717-1751.

be easy to separate in reality, but their nature differs considerably ratione materiae, ratione temporis and ratione personae. It is the reason why the Special Rapporteur considers it appropriate not to consider such activities for the purposes of the present topic while treating the legal consequences of the rehabilitation phase carefully[76] so as not to be detrimental to the norms governing development matters.[77]

IV. Form of the work

59. Citing the Convention on the Privileges and Immunities of the United Nations as a possible model, the stated objective of the Secretariat's proposal for the topic was the elaboration of a set of provisions which would serve as a legal framework for the conduct of international disaster relief activities.[78] In this connection, some consideration might be given at the outset to the qualitative purpose of the Commission's work on this topic. Is the Commission's task limited to codification of existing law and practice or will it extend beyond de lege ferenda? The Secretariat proposal indicated that the work would be primarily limited to the former, with emphasis on progressive development as appropriate. At any rate, the Commission has itself considered that its drafts constitute both codification and progressive development of international law in the sense in which those concepts are defined in the Statute, and has found it impracticable to determine into which category each provision falls.[79] Nevertheless, given the amorphous state of the law relating to international disaster response, striking the appropriate balance between lex lata and lex ferenda poses a singular challenge.

60. Regarding the form that the final product is to take, the Secretariat's proposal, by stating that the objective is the elaboration of a framework convention, would seem to have placed the emphasis on progressive development, in conformity with article 15 of the Commission's statute, which contemplates the progressive development of international law by means of the preparation of draft conventions. Nevertheless, in practice, the Commission has utilized a variety of other forms in which to couch its final drafts: model rules, principles, guidelines, declarations, codes etc. Regardless of the final form, the Commission, with few exceptions, embodies the result of its work in draft articles, prepared following its well-established methods of work. That should be also the case as regards the present topic. In conformity with its usual practice, the Commission's decision on the form

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[76] See, for example, European Court of Human Rights, *Dogan v. Turkey* (Application Nos. 8803-8811/02, 8813/02 and 8815-8819/02), Third Section Judgment of 29 June 2004, para. 154, where the Court discussed the legal consequences of rehabilitation activities after the occurrence of an emergency. The relevant paragraph reads in part: "For the Court, however, the authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow the applicants to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country (see in this respect principles 18 and 28 of the United Nations Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2, dated 11 February 1998)".

[77] See the Declaration on the Right to Development (General Assembly resolution 41/128 of 4 December 1986, annex).

[78] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), annex C, para. 24.

[79] *Yearbook of the International Law Commission*, various issues (see http://treaty.un.org/ilc/ilcintro.htm#_ftn120).

to be recommended to the General Assembly for its final draft articles may, in principle, await the completion of work on the present topic. Nevertheless, the special characteristics of such a novel undertaking might make it advisable to arrive at an early understanding of what the final form should be, especially if guidelines, rather than a convention, might make the final draft more acceptable to States.

V. Conclusions

61. The present, preliminary report is intended to provide a basis for a constructive discussion in the Commission which will facilitate determination of the general scope of the topic on the protection of persons in the event of disasters.

62. Without prejudice to the outcome of the Commission's discussion of the scope, it is the view of the Special Rapporteur that the title chosen for the topic implies a wide perspective. Work on the topic can be undertaken with a rights-based approach that will inform the operational mechanisms of protection.

63. The identification of the underlying principles and the elaboration of the rules derived therefrom need to be reflected in a future set of draft articles as regards each of the two elements of protection (a lesson that can be learned from the experience of the International Relief Union).

64. While the Commission requested the Secretariat to prepare a background study initially limited to natural disasters, the Special Rapporteur is of the view that the Commission could usefully embark, pari passu, on work concerning both natural and man-made disasters.

65. Work on the topic will clearly need to take account of the multiplicity of actors in disaster situations.

66. To achieve complete coverage, work on the topic should extend to all three phases of a disaster situation, but it would appear justified to give particular attention to aspects relating to prevention and mitigation of a disaster as well as to provision of assistance in its immediate wake.